Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

MICHAEL FINE, et al.,

Petitioners,

v.

AMERICA ONLINE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT D. GARY
JORI BLOOM NAEGELE
THOMAS R. THEADO
GARY, NAEGELE & THEADO
446 BROADWAY AVENUE
LORAIN, OH 44052-1797
(440) 244-4809

JOSHUA R. COHEN
Counsel of Record
KOHRMAN, JACKSON
& KRANTZ P.L.L.
1375 E. NINTH STREET
ONE CLEVELAND CTR., 20TH FL.
CLEVELAND, OH 44114-1793
(216) 696-8700

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

67AP

QUESTIONS PRESENTED FOR REVIEW

1. May a state court extend full faith and credit to a class-action judgment rendered elsewhere without independently evaluating the sufficiency of the notice provided to class members under the Due Process Clause?

2. Does a class-action settlement notice satisfy the requirements of the Due Process Clause if it appears only on an Internet bulletin board, when the parties could have sent actual, personal notice to each class member?

THE PARTIES

Michael W. Fine, Rodney Long, and Dan Rambo are the parties petitioning for a writ of *certiorari*.

America Online, Inc. is the sole respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michael W. Fine, Rodney Long, and Dan Rambo are seeking review of an opinion issued by the Ninth District Court of Appeals for the State of Ohio, *Fine v. America Online, Inc.*, No. 98CA007188, slip. op. (Ohio App. May 17, 2000). The decision affirmed a summary judgment entered against the Petitioners in a state-wide class action brought against Respondent America Online, Inc. (AOL) under the Ohio Consumer Sales Practices Act, Ohio Rev. Code §§ 1345.01-1345.99.

The trial court had held that the court-approved settlement from a national class action brought against AOL precluded the Petitioners' claim, both under the Full Faith and Credit Clause of the United States Constitution and as a matter of *res judicata*. The Petitioners had argued that class members received constitutionally deficient notice in the prior case and dispute the settlement's binding effect on that basis.

The Ohio Supreme Court declined to review the Ninth District decision. *Fine v. America Online, Inc.*, 90 Ohio St. 3d 1427, 736 N.E.2d 24 (2000) [TABLE]. Three of the seven justices (including Chief Justice Moyer) dissented from this ruling. *Id.*

LOWER COURT RULINGS

Copies of both the Ninth District decision and the order of the Ohio Supreme Court appear in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The Ohio Supreme Court issued its ruling in this case on October 4, 2000, 90 days before the filing of this Petition. The Court has jurisdiction to review the case pursuant to 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST., § 1, ART. IV

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

U.S. CONST., AM. XIV

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OHIO REV. CODE § 1345.02(A)

> "No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."

STATEMENT OF THE CASE

I. General Background

AOL sells access to the Internet to users of personal computers. Subscribers at one time paid a monthly fee that entitled them to use AOL only for a prescribed number of hours. The company would then charge an hourly fee for any additional time spent on-line.

AOL changed its billing format in December of 1996. Beginning at that time, subscribers could use AOL on an "unlimited" basis for a flat monthly fee of $19.95.

On January 22, 1997, the Petitioners filed this case in the Court of Common Pleas of Lorain County, Ohio. In their Complaint, they accused AOL of violating the Ohio Consumer Sales Practices Act (CSPA) in marketing its unlimited-access plan. The CSPA generally prohibits suppliers of consumer goods and services from committing any "unfair or deceptive act or practice in connection with a consumer transaction." OHIO REV. CODE § 1345.02(A).

II. AOL's Unlimited Access Plan

AOL had implemented its "unlimited" access plan as a way to expand its customer base and preserve its status as the world's preeminent Internet service provider. The company realized that "unlimited" access would serve as a tantalizing "hook" in attracting new subscribers. Steve Case, AOL's chairman of the board, opined in September, 1996 that with "a pricing change (to some variation of unlimited), we may be invincible."

AOL touted the "unlimited" access plan to existing customers during December, 1996 and January, 1997. The company at the same time mounted an aggressive campaign to attract new subscribers, offering them 50 free hours on-line before the $19.95 flat-fee arrangement went into effect.

Only a finite number of AOL customers can be on-line at any given time. Other subscribers cannot log onto the system once the limit is reached. In its advertisements, AOL did not mention this practical restraint upon the availability of AOL's network.

In fact, AOL lacked sufficient capacity to accommodate the unlimited access it was selling. Internal company memoranda reveal that by mid-January, 1997, AOL was accommodating fewer than 30 percent of the customers who attempted to log on during normal hours of usage. Even after the company began to upgrade its system, users had less than a fifty-fifty chance of accessing AOL at these times.

AOL knew beforehand that it would not be able to handle the explosion in traffic that "unlimited" access would trigger. Company management explicitly anticipated this problem in a confidential business plan prepared in October,

1997. The document acknowledged AOL had already run out of time "to change [its] planned capacity in January 1997," when the new unlimited-access plan would reach full implementation.

Internal communications at AOL confirm that the company was planning to tell subscribers about the limitations on their unlimited access only after they had signed on the dotted line:

> "Unlimited" means entitlement to 24 hours/day use to many members, and has set unrealistic expectations in many cases. We should consider changing the definition of our "unlimited" pricing plan, *once people become members*. [Unlimited access] is a very compelling offer; we likely need to keep it in our marketing messages...but *once on-line*, call unlimited a "fixed rate" plan (emphasis added).

Behind closed doors, AOL pondered the legality of promising consumers "unlimited" access that was not really "unlimited":

> Food for thought -- there may be a legal obligation to provide a service for which people have paid. I'm not sure. If you didn't have access to your phone for several weeks, would you still pay for the service?

In its quest for "invincib[ility], AOL did not allow concerns of this nature to hinder its marketing of unlimited access.

III. The Assurance of Voluntary Compliance

While the Petitioners and others pursued private litigation against AOL, the attorney generals from 45 states (including Ohio) were bringing charges against the company for the severe inaccessibility of the "unlimited" access that it was selling to consumers. AOL resolved these matters during February of 1997 by signing an Assurance of Voluntary Compliance. The Assurance obligated AOL to make credits and free service available to subscribers afflicted by congestion of its network. The specific benefits that a customer would obtain depended upon the level of his or her AOL usage during the preceding months. While establishing these remedies, the Assurance explicitly preserved the right of parties like the Petitioners to proceed with private litigation against AOL.

IV. Class Certification

On February 9, 1997, the trial court granted the Petitioners' motion to certify this litigation as a class action. Under the ruling, all AOL subscribers in the state of Ohio became eligible to participate in the case.

The trial court authorized the use of electronic mail to notify prospective claimants about the lawsuit. The Petitioners sent a letter to the personal e-mail address that each Ohio subscriber had on the AOL network. Upon conclusion of the opt-out period, the class consisted of approximately 265,000 Ohio subscribers.

V. The National Class Action

During January, 1997, a case known as *Scwab v. America Online, Inc.* was filed in the Circuit Court of Cook

County, Illinois. *Schwab* arose from the same misconduct underlying this case: AOL's misleading promotion of its unlimited access plan. On these grounds, the plaintiff in *Schwab* asserted claims for fraud and violation of the Illinois consumer-protection statute on behalf of himself and all other AOL subscribers in the United States.

Within weeks, the parties to the national class action had negotiated a tentative settlement. The proposed deal potentially entitled class counsel to $3,000,000 in attorneys fees for their few days of work.

In contrast, members of the putative class would receive little meaningful relief from the negotiated terms. At its essence, the settlement simply tweaked the benefits that the Assurance of Voluntary Compliance had already made available. Additionally, only those subscribers who submitted a formal claim application could take advantage of the slightly enhanced terms.[1]

AOL told the Illinois court that it did not have the "capacity to send a mass e-mail" regarding the settlement to all of its United States subscribers, even though the Petitioners had used this means in notifying all Ohio subscribers. *Schwab v. America Online, Inc.*, No. 96 CH 13732, slip op. at *9 (Ill. Cir. Ct. Feb. 18, 1997). Instead, the Illinois litigants disclosed the settlement in certain newspaper advertisements and in an announcement planted

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[1] The exact terms of the settlement are set forth in the written decision of the Cook County trial judge approving the deal, a copy of which appears in the Appendix to this Petition. *Scwab v. America Online, Inc.*, No. 96 CH 13732, slip op. (Ill. Cir. Ct. Feb. 18, 1997).

among various promotional messages on the AOL Welcome Screen.

As its name implies, the Welcome Screen appears when AOL users first log onto the system. It functions essentially as a computerized bulletin board, with postings that change regularly.

The Welcome-Screen settlement message did not identify which of the several pending class actions was being settled, nor did it indicate which AOL customers would be covered by the deal. Those AOL subscribers who managed to spot the notice still had to click their way through a series of intermediate steps before reaching any substantive information about the settlement.

The response elicited by the Welcome-Screen notice attests to its utter inaccessibility. *Less than one percent* of the national class submitted the mandatory claim forms.

The trial court had already certified this lawsuit as an Ohio class action when the tentative settlement was reached in *Schwab*. Ohio subscribers had also received the Petitioners' e-mail notification by that time. Nevertheless, the national settlement notice made absolutely no mention of this class action.

Would the national settlement supersede the Ohio lawsuit? Could Ohio subscribers participate in both? If not, what if anything could they do to preserve their right to pursue relief either in this action or in a separate suit in Ohio? The *Schwab* notice left Ohio subscribers completely in the dark regarding these fundamental issues.

The Cook County Circuit Court approved the settlement in an order dated February 18, 1997. *Schwab*, slip op. at *10. In explaining its acceptance of the relatively meager terms, the court expressed doubt about the plaintiff's ability to prove either that AOL intentionally misled subscribers about the unlimited access plan or that class members actually relied upon the contested representations. *Id.*, p. 5.

The Petitioners, however, would not have had to prove intent to substantiate their claim against AOL under the Ohio Consumer Sales Practices Act. *Thomas v. Sun Furniture & Appliance, Inc.*, 61 Ohio App. 2d 78, 81, 399 N.E.2d 567, 570 (1978). Nor does the statute require evidence that consumers relied upon the defendant's deceitful acts. *In re Brown*, 215 B.R. 844, 847-48 (Bankr. E.D. Ky. 1998).

VI. Decision Of Ohio Court Of Appeals

The dissent from Ohio's Ninth District court did not mince words in endorsing the premise underlying the Petitioners' appeal – that the deficiency of the national settlement notice under the Due Process Clause disqualified *Schwab* from the full faith and credit extended to it by the trial court:

> [T]he notice procedures approved in *Schwab* are not consistent with any real due process analysis. * * * Not only was personal notice not required [by the court], there was not even any requirement that the notice ... be titled in such a way as to draw the attention of subscribers.

Fine, slip op. at p. 18 (Baird, J., dissenting).

The dissent found it "hard to imagine any notice being any less likely to draw the attention of a subscriber and give notice" regarding the settlement. *Fine*, slip op. at pp. 18-19 (Baird, J., dissenting). In its view, the Illinois notice fell "ludicrously short" of what due process required. *Id.*, p. 18.

The Ninth District majority did not take issue with these conclusions, at least not explicitly. It instead simply ratified the Illinois court's determination that the Welcome-Screen notification satisfied constitutional standards. *Fine*, slip op. at pp. 18-19. The majority pointed to considerations of efficiency and judicial economy in rationalizing its refusal to analyze this issue for themselves:

> "[B]y engaging in a substantive collateral review, this Court would ... [have to] attempt to essentially 'recreate the wheel.'"

Fine, slip op. at p. 12. In the majority's view, class members forfeited their right to challenge the notice if they failed to do so in the Illinois litigation itself. *Id.*, pp. 11-14.

VII. Petition To Ohio Supreme Court

On July 3, 2000, the Petitioners filed their Memorandum in Support of Jurisdiction with the Ohio Supreme Court. In seeking review of the Ninth District decision, the Petitioners again argued that the class notice in *Schwab* violated due-process standards, thereby disqualifying the settlement from enforcement under the Full Faith and Credit Clause. In addition, the Petitioners argued that the Ninth District erred (both as a matter of state and federal law) in failing to analyze the sufficiency of the *Schwab* notice for itself under the Due Process Clause.

REASONS FOR ALLOWING THE WRIT

I. Introduction

This case addresses the most basic component of due process – the right to notice. The order approving the national settlement vanquished the claims of more than a quarter-million Ohioans, the overwhelming majority of whom almost certainly never heard of the Illinois litigation, and none of whom received personal notification about the settlement before it went into effect.

This case also involves a state court's abdication of its duty to enforce the Constitution. The Ohio appellate panel allowed considerations of efficiency and judicial economy to trump the mandate of due process by simply taking the Illinois judge's word for it that the settlement notice satisfied constitutional standards.

The Ninth District did more than just undercut the Petitioners' right to adequate notice (although it certainly did do that). Its decision also effectively forecloses absent class members from contesting the constitutionality of a class-action judgment in subsequent litigation. The elimination of collateral review places the continued viability of class-action procedure very much in jeopardy. This development invites expediency – and worse – on the part of class representatives, given class members' restricted opportunity to challenge their handling of the case. Absent class members also cannot afford to remain absent if the litigation's outcome will absolutely bind them, even if an irregularity not readily apparent to inactive participants fundamentally taints the proceedings.

These considerations justify allowance of the writ sought by the Petitioners. So does the influence that a decision from the Court would have upon the use of e-mail in serving class notice.

The computer has taken on a pervasive presence in virtually every facet of American life, including the law. Courts in certain jurisdictions are already allowing parties to file pleadings via e-mail. The Internet inevitably will become a standard means of transmitting other legal communications, including notification of potential claimants in class-action lawsuits.

What does the Constitution require in such situations? The Ohio court's acquiescence to the Welcome-Screen posting in *Scwab* suggests – insupportably – that the Constitution requires less with respect to e-mail than it does when legal process is served in the traditional way. A decision from the Court could preempt further divergence from existing precedent and preserve the vitality of the Due Process Clause in the age of the computer.

II. The *Schwab* Settlement Notice Did Not Satisfy The Requirements Of Due Process.

As a matter of due process, the disposition of a class action does not bind absent class members unless they were afforded adequate notice regarding the case. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The means of notification must be "the best practicable" under the attendant circumstances. *Id.* at 812, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *see generally* U.S. CONST., AM. XIV.

In keeping with this rule, class representatives must provide eligible claimants with *actual, personal* notice whenever possible. *Eisen v. Carlisle & Jaqueline*, 417 U.S. 156, 172 (1974). This requirement is not subject to waiver. *Id.* at 176. Nor does it cease to apply simply because the size of the class makes individual notice expensive or otherwise difficult. *Id.* at 173.

Correspondence sent to class members by first-class mail qualifies as actual personal notice for purposes of due process. *Shutts*, 472 U.S. at 812. By analogy, so does e-mail, which courts have recognized as the virtual equivalent of first-class mail. NOTE, "E-MAIL: A CONSTITUTIONAL (AND ECONOMICAL) METHOD OF TRANSMITTING CLASS ACTION NOTICE," 47 *CLEV. ST. L. REV.* 87, 98 (1999); *see also Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 400 (E.D. Pa. 1996);. *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997).

The *Schwab* settlement notice falls in a far different category, however. The Welcome-Screen message was buried among various advertisements and announcements, where class members may or may not have seen it. Nothing about the posting signaled its pertinence to any particular individual, unlike a letter in a mailbox (at the front door or in cyberspace), which is addressed specifically and exclusively to the recipient.

As this Court has long recognized, "[i]t would be idle to pretend that publication" of this sort, standing "alone, ... is a reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane*, 339 U.S. at 315. The inefficacy of such indirect communication becomes particularly acute if the notice does not identify "those whose

attention it is supposed to attract, and does not inform acquaintances who might call it to attention." *Id.* Given these considerations, due process does not permit notice by publication alone if the class representative has reasonable access to the names and addresses of eligible claimants. *Id.* at 314-15; *see also Eisen*, 417 U.S. at 174; *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

AOL strained the bounds of credibility in denying its ability to send e-mail to its subscribers in the United States. Whatever the case, the company necessarily knew the street addresses of these individuals, all of whom it was billing on a monthly basis. If all else failed, AOL could have used conventional means to provide class members with individual, actual notice of the proposed national settlement. Its failure to do so violated due process.

So did the absence of any discussion of this lawsuit in the *Schwab* settlement notice. The "best practicable" notice standard governs the content of the notice as well as its means of dissemination. In particular, class members must receive sufficient information to discern the nature of the lawsuit and its impact upon their rights, and to determine whether to remain a part of the case. *Shutts*, 472 U.S. at 811-12; *see also Mullane*, 339 U.S. at 314.

The "decision regarding which of two classes a [claimant] wishes to belong to is as important as the decision whether he will" even participate in class litigation at all. *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 412 (2nd Cir. 1975). "That decision must be made by the individual *after notice* of" the various alternatives. *Id.* (emphasis added). Given this rule, the class notice must reveal any "inconsisten[cies]" between the class action and "related" litigation. *Roberts v. Heim*, 130 F.R.D. 416, 422 (N.D. Cal.

1988). If a proposed class-action settlement will cause the "automatic termination" of such other cases, due process requires the notice to say so directly. *McCubbrey v. Boise Cascade Home & Land Corp*, 71 F.R.D 62, 68 (N.D. Cal. 1976); *see also Romstadt v. Apple Computer, Inc.*, 948 F. Supp. 701, 703, fn. 3 (S.D. Ohio 1996) (expressing "concern" that Ohio class action received no mention in settlement notice from competing class action); *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2nd Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (approving notice that described competing class action "in detail" and informed class members that participating in settlement would disqualify them from recovery in other case).

As previously discussed, the notice in *Schwab* did not explain how the national settlement might affect the rights asserted on behalf of Ohio subscribers in this action. In the wake of this omission, Ohio class members could have reasonably concluded that the two cases were completely separate, obviating any apparent need to opt out of the Illinois litigation in order to preserve their claims under the Ohio Consumer Sales Protection Act.

In reality, of course, Ohio subscribers completely forfeited their rights in this action by failing to withdraw from *Schwab*. The non-disclosure of this fact exacerbates the constitutional inadequacy of the national settlement notice.

III. Courts Must Independently Review The Sufficiency Of The Settlement Notice From A Prior Class Action Before Extending Full Faith And Credit To The Earlier Case.

The Full Faith and Credit Clause does not extend to judgments rendered in violation of due process. *Griffin v.*

Griffin, 327 U. S. 220 (1945); *see also Shutts*, 472 U.S. at 809-10; U.S. Const., § 1, Art. IV. The Ohio appellate court took the teeth out of this principle by refusing to evaluate for itself the national settlement notice. In approving a proposed class settlement, courts "almost always [will] have determined, as a prerequisite to such, that the members have been provided the appropriate notice." *Battle v. Liberty Nat. Life Ins. Co.*, 770 F. Supp. 1499, 1513, fn. 39 (N.D. Ala. 1991), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 509 U.S. 906 (1993). If tribunals from elsewhere automatically adopt this finding as their own, full faith and credit would apply in every instance, even if the evidence revealed serious defects in the notice.

Class members victimized in this fashion "will, by definition, not have had an opportunity in the initial litigation to be heard on the issue of due process." *Battle*, 770 F. Supp. at 1512. *Schwab* provides a case in point. Only fortuity would have enabled Ohio class members to spot the settlement notice posted on the AOL Welcome Screen; once they did so, only a crystal ball would have enabled them to discern from the text what the true implications of the proposed settlement. Situations such as this make "collateral attacks ... necessary ... [to] the class action scheme" and "integral to the constitutionality" of such litigation. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 769 (3rd Cir.), *cert. denied*, 493 U.S. 821(1989).

As the Court has noted,

> an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.

Shutts, 472 U.S. at 810. Those "safeguards" become illusory if courts simply rubber-stamp class-action settlements from other jurisdictions, without independently determining their compliance with the Due Process Clause. The Ohio court of appeals did exactly that by refusing to review the national settlement notice.

CONCLUSION

The Petitioners have raised significant constitutional questions that require the attention of the Court. The writ for *certiorari* should be allowed.

Respectfully submitted,

/s/_____
Robert D. Gary
Jori Bloom Naegele
Thomas R. Theado
Gary, Naegele & Theado
446 Broadway Avenue
Lorain, Ohio 44502-1797
(440) 244-4809

/s/_____
Jonathan M. Yarger
Joshua R. Cohen (Lead Counsel)
Kohrman Jackson & Krantz PLL
20th Floor, One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114
(216) 696-8700

APPENDIX A

THE SUPREME COURT OF OHIO

[Filed October 4, 2000]

No. 00-1197

Michael Fine, et al.,	)
Appellants,	)
	)
v.	)
	)
America Online, Inc.,	)
Appellee.	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Kohrman, Jackson & Krantz P.L.L.

(Lorain County Court of Appeals; No. 98CA007188)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

[Filed: May 17, 2000]

C.A. No. 98CA007188

MICHAEL FINE, et al.,	)
Appellants,	)
	)
v.	)
	)
AMERICA ONLINE, INC.,	)
Appellee.	)
	)

APPEAL FROM JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS COUNTY OF
LORAIN, OHIO
CASE NO. 97-CV118102

DECISION AND JOURNAL ENTRY

Dated: May 17, 2000

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

Michael Fine, Rodney Long and Dan Rambo, for themselves and as the representatives of a certified plaintiff class, have appealed from a judgment of the Lorain County Court of Common Pleas granting summary judgment in favor of America Online, Inc. This Court affirms.

I.

Prior to December 1, 1996, America Online, Inc. (AOL), an internet service provider, offered access on a "metered basis," *e.g.* $9.95 per month for five hours, with each additional hour billed at $2.95. However, on December 1, 1996, AOL launched a national marketing campaign under which it offered unlimited service for a flat fee of $19.95 per month. As a result of this offer, AOL's lines were flooded with users, and almost immediately AOL's service ground to a virtual halt. With the volume of member usage hours growing and increased number of subscribers attempting to log-on, the immense traffic congestion was immediate and devastating. AOL's system had essentially been drowned in a hail of users.

On December 18, 1996, Steven Schwab, for himself and as a representative of a consumer plaintiff class allegedly harmed by AOL's offer and inadequate service capacities, filed suit against AOL in the Cook County Circuit Court in Chicago, Illinois (Circuit Court).[1] On January 30, 1997, the

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[1] The *Schwab* suit was the first of over ninety suits filed nationwide in response to AOL's December 1996 offer of

Circuit Court certified the suit as a class-action with a national class.[2] On February 26, 1997, the Circuit Court approved: (1) the on-line Notice of Pendency of Class Action, with its opt-out provisions; and (2) the Summary Notice of Pendency of Class Action to be published in *The Chicago Tribune*, *The Los Angeles Times*, *The New York Times* and *USA Today*. The Circuit Court expressly found that these forms of notice constituted the best notice practicable under the circumstances and that each constituted valid, due and sufficient notice to all members of the national class. On January 22, 1997, Michael Fine, Rodney Long and Dan Rambo, for themselves and as the representatives of an Ohio consumer plaintiff class (Ohio class), filed another suit in the Lorain County Court of Common Pleas, rooted in the same facts as the *Schwab* lawsuit. On February 6, 1997, the Common Pleas Court certified this matter as an Ohio-only class-action. Four days later, the court approved and ordered the appropriate notices to issue.

On April 3, 1997, the *Schwab* class reached a tentative settlement, subject to court approval. The settlement essentially provided a scheme in which class members were to file claims for a refund and/or credit in exchange for a release of all other state and federal claims relating to AOL's inability to manage the increased demand for service after

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"unlimited access" for a flat fee. Only two of those cases are at issue here: the *Schwab* action and the case at hand, *Fine v. AOL, Inc.*

[2] On February 19, 1998, the Circuit Court explicitly stated that this determination was based on its review of Section 2-801 of the Illinois Code of Civil Procedure *et seq.*

December 1, 1996.[3] Again, the Circuit Court ordered and approved on-line notice. *Schwab* class members were informed of their right to participate in the proposed settlement, their right to object and, for a second time, their right to exclude themselves from the suit.

On November 20, 1997, the Circuit Court conducted a fairness hearing to consider all objections. Counsel for the Ohio class attended this hearing but did not voice any objections. On February 19, 1998, the Circuit Court issued its final approval of the *Schwab* settlement, finding it both fair and reasonable.

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[3] The release provided, in pertinent part:

> Upon Court approval of the Settlement becoming final, the [*Schwab*] Class members . . . shall have fully, finally and forever released . . . all Released Claims against the Released Parties. "Released Claims" means any and all claims, rights . . . , demands, actions, causes of action [and] suits, . . . including unknown claims, whether under Federal law . . . or the laws ... of any and all states . . . relating in any way to Class members' use of AOL's online service, . . . the manner in which AOL's online service is or has been marketed, promoted, provided or billed to members . . . , or the costs or alleged damages incurred by Class members in connection with being subscribers of AOL or using or attempting to use AOL's online service, from December 1, 1996 until the date of final Court approval[.]

On April 24, 1998, the Ohio class moved the Common Pleas Court for partial summary judgment on the merits, and six days later, on April 30th, AOL likewise moved for summary judgment, claiming preclusion. After reviewing extensive briefs and hearing oral arguments, on July 28, 1998, the Common Pleas Court (1) granted summary judgment in favor of AOL finding that the settlement reached in the *Schwab* case precluded the Ohio class' suit, and (2) denied the Ohio class' motion for partial summary judgment. From that order, the Ohio class timely appealed, asserting two assignments of error. For ease of discussion, the second assignment of error will be addressed first.

II.

In its second assignment of error, the Ohio class has argued that the requirements of due process were not satisfied during the *Schwab* action, and that as a result, its claims cannot be barred. In response, AOL has argued that due process was in fact afforded, and that under the law of preclusion and the Full Faith and Credit Clause of the United States Constitution, the Ohio class, as members of the national class certified in the *Schwab* case, are bound by the settlement approved by the Circuit Court.

In order to evaluate the parties' arguments, this Court must (1) examine the terms of the Full Faith and Credit Clause, (2) look to Illinois law to determine whether the Ohio class would be barred from raising its claims in an Illinois lawsuit, and (3) determine whether the Illinois judicial system, specifically the Circuit Court, extended due process to the *Schwab* class when approving the form of notice

employed in that action and finding that the class members were adequately represented.[4]

FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause, Section 1, Article IV, United States Constitution, provides that full faith and credit "shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 132, quoting *Wyatt v. Wyatt* (1992), 65 Ohio St.3d 268, 269 (pursuant to Full Faith and Credit Clause, Ohio courts must recognize the validity of judgments rendered in sister states). In essence, Ohio courts must give the judicial proceedings of another state the same faith and credit "as they have by law or usage in the courts of such State * * * from which they are taken." *Holzemer,* 86 Ohio St.3d at 132, quoting Section 1738, Title 28, U.S.Code. Thus, this Court must give the same "credit" to the Illinois proceeding at issue in this case as that proceeding would carry in Illinois' own courts. *Id.*, citing *Durfee v. Duke* (1963), 375 U.S. 106, 109, 11 L. Ed. 2d 186, 190. See, also, *Matsushita Elec. Indus. Co., Ltd. v. Epstein,* (1996) 516 U.S. 367, 373-374, 134 L. Ed.2d 6, 16-17.

In order to determine what "credit" the Illinois courts would have given the *Schwab* case, this Court must engage in

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[4] Pursuant to Canon 3(F) of the Code of Judicial Conduct, this Court notes that each member of this panel is a past or present subscriber of AOL's services. This Court further notes that each party waived any and all objections to this fact during oral arguments.

a fiction. This Court must first act as if the Ohio class had filed its lawsuit as a separate Illinois action. Then, this Court must give the *Schwab* case the same effect or credit that it would have carried in that second, hypothetical suit in Illinois. If the Ohio class would have been precluded from litigating its claims in that hypothetical suit in Illinois, then under full faith and credit principles, the Ohio class would be precluded from litigating its claims in Ohio. *Holzemer,* 86 Ohio St.3d at 132; see, also, Erichson, *Interjurisdictional Preclusion* (1998), 96 MICH.L.REV. 945, 950; Lilly, *The Symmetry of Preclusion* (1993), 54 OHIO ST.L.J. 289, 310-311.

ILLINOIS LAW OF PRECLUSION

Under the Illinois law of preclusion, a final judgment will bar further action if such involves: (1) identity of parties or their privies in the two suits; (2) identity of causes of action in the prior and current suit; and (3) a final decision on the merits of the prior suit. *River Park, Inc. v. City of Highland Park* (1998), 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889.[5] If all three requirements are satisfied, the party or those in privity with that party are barred from relitigating matters that were raised or could have been raised in the prior action. See *La Salle County v. YMCA* (1984), 101 Ill.2d 246, 251-252, 461 N.E.2d 959, 961; *Hughey v. Industrial Comm.* (1979), 76 Ill. 2d 577, 582-583, 394 N.E.2d 1164, 1166. The

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[5] When applying full faith and credit, the fact that the judgment at issue incorporates the results of a class-action settlement, rather than being the result of full litigation makes no difference. *Matsushita,* 516 U.S. at 374-375. See, also, *Majeske v. Fraternal Order of Police, Lodge 7* (C.A.7, 1996), 94 F.3d 307, 312.

party seeking preclusion has the burden to show what was determined by the prior judgment. *Lolling v. Patterson* (C.A.7, 1992), 966 F.2d 230, 235, citing *Redfern v. Sullivan* (1982), 111 Ill. App. 3d 372, 377, 444 N.E.2d 205, 209.

In the case at bar, AOL has demonstrated that the *Schwab* class necessarily included the members of the Ohio class. The Circuit Court in its January 31, 1997 order expressly found the class to include "[a]ll AOL subscribers throughout the United States who were subscribers to AOL on December 1, 1996 or became subscribers on said date or thereafter." AOL has further shown that the underlying claims being made in the *Schwab* case are the same assertions that the Ohio class seeks to litigate. It is readily apparent from the Circuit Court's final entry in the *Schwab* action, introduced by AOL, that the underlying facts and circumstances are the same. See *Schwab v. AOL, Inc.* (February 19, 1998), Cook C.C. 96 CH 13732, unreported, at 1-2. AOL has also demonstrated that the Circuit Court order approving the *Schwab* settlement was on the merits. See *Majeske,* 94 F.3d at 312. The Ohio class has not contested any one of these three points. As such, after engaging in the legal fiction outlined previously, this Court holds that the decision rendered by the Circuit Court in the *Schwab* case would, under Illinois law, preclude the Ohio class from litigating this action.

DUE PROCESS

Having determined that Illinois law would bar the Ohio class from proceeding, the United States Constitution nevertheless deems it incumbent upon this Court to determine whether that class was afforded due process in the first

instance. *Kremer v. Chemical Constr. Corp.* (1982), 456 U.S. 461, 480-481, 72 L. Ed.2d 262, 280; *Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.* (C.A.6, 1999), 193 F.3d 415, 425-426 (noting that the minimum requirements of due process inform both preclusion and class-action doctrines). "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer,* 456 U.S. at 482, 72 L. Ed.2d at 281. In other words, the Ohio class is barred from advancing its suit in Ohio only if the settlement in the *Schwab* case met due process requirements.

Traditionally, a court's judgment is binding on parties only if they were given constitutionally sufficient notice and if the court had both personal and subject matter jurisdiction. In the class-action context, the United States Supreme Court has added the requirement of adequate representation and in actions "predominately" for money damages, an "opt-out" right. *Matsushita,* 516 U.S. at 395, 134 L. Ed.2d at 30 (Ginsburg, J., concurring in part and dissenting in part); *Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, 812, 86 L. Ed.2d 628, 642. However, the *Shutts* Court held that in a state class-action with a multi-state plaintiff class, the forum court may still assert jurisdiction over unnamed foreign plaintiffs even when those absent members have no contacts with the forum state, *i.e.* the forum court lacks personal jurisdiction. *Shutts.* at 806-811, 86 L. Ed.2d at 638-642. This is not to say that the forum court's assertion of jurisdiction need not meet the requirements of due process. The absent class members must still receive notice, adequate representation and an opportunity to opt out of the litigation. *Id.* at 811-812, 86 L. Ed.2d at 641-642.

By way of collateral attack upon the procedures approved and employed by the Circuit Court in *Schwab*, the Ohio class has argued that this Court should not enforce the Circuit Court's judgment in Ohio. Specifically, the Ohio class has challenged the notice of settlement and the adequacy of representation, thereby suggesting that this Court has the authority to directly review these matters for purposes of enforcement in Ohio. AOL, in response, has argued that the Circuit Court provided sufficient notice to all the *Schwab* and Ohio class members and that it ensured all absent class members adequate representation. In short, the parties have collectively argued that this Court must review the Circuit Court's decision *de novo*. This Court disagrees.

1. Collateral Review of Procedural Due Process

Modern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but rather by the application of appropriate procedures in the certifying court and by the courts that review its determinations. *Epstein v. MCA, Inc.* (C.A.9, 1999), 179 F.3d 641, 648, certiorari denied (1999), --U.S.--, 120 S. Ct. 497 ("[D]ue process does not require collateral second-guessing of those determinations and that review."). See, also, *Rion v. Mom & Dad's Equip. Sales & Rentals, Inc.* (1996), 116 Ohio App. 3d 161, 165 (noting that the full faith and credit clause "requires the courts of this state to honor judgments from other states without re-examining the merits of their claims"), citing *Durfee v. Duke* (1963), 375 U.S. 106, 110-111, 11 L. Ed.2d 186, 190-191 and *Dressler v. Bowling* (1986), 24 Ohio St.3d 14, 16. Thus, the appropriate collateral review involves an examination of *procedural* due process and nothing more. As long as

procedural safeguards are established by the law and employed, absent class members' objections to the determinations of the certifying court may be properly remedied on appeal within the forum state's judicial system and to the United States Supreme Court. See *Epstein*, at 648, citing *Grimes v. Vitalink Communications Corp.* (C.A.3, 1994), 17 F.3d 1553, 1558 and *Nottingham Partners v. Trans-Lux Corp.* (C.A.1, 1991), 925 F.2d 29, 33; *King v. South Central Bell Telephone and Telegraph Co.* (C.A.6, 1986), 790 F.2d 524, 528 (noting that the application of the law of preclusion in the class-action context does not relate to "whether the judgment relied on was a right or wrong decision"); *Kamilewicz v. Bank of Boston Corp.* (C.A.7, 1996), 92 F.3d 506, 512. See, also, Murphy, The Intersystem Class Settlement: Of Comity, Consent, and Collusion (1999), 47 U.Kan.L. Rev. 413, 489 ("The concept of collateral attack as in the nature of an extraordinary remedy suggests the more limited type of review reflected in the procedures-only review."). Traditionally, grounds which may be invoked to advance collateral attacks are much more limited than those that may be sustained as error on direct appeal.[6] To hold otherwise would create a form of collateral review that is inconsistent with both the spirit of the class-action mechanism and the principles at the very core of the full faith and credit doctrine.

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[6] Grounds for collateral attack have been generally limited to corruption, duress, fraud, collusion or mistake. See *Martin v. Wilks* (1989), 490 U.S. 755, 771, 104 L. Ed. 2d 835, 850 (Stevens, J., dissenting).

As one commentator recently noted, one of the more troubling features of modern class-action law is the increasing frequency of overlapping litigation, *i.e.* class-action suits based on common facts or circumstances filed in more than one court. Miller, Full Faith and Credit to Settlements in Overlapping Class Actions (1998), 73 N.Y.U.L.Rev. 1167, 1167. Such cases present a difficult problem of policy because two competing goals are at stake: efficient enforcement of the law, on the one hand, and on the other, respect for independent sovereignty of the jurisdictions in which the various collateral suits are brought. *Id.* at 1167-1168. Thus, the benefits that attend effective time management and the preservation of judicial resources must be carefully weighed against the concern for individual state sovereignty.

A. Time Management

The class-action mechanism exists in large measure to allow courts the ability to manage those cases which involve numerous parties, and similar, if not identical issues that would otherwise cause significant congestion of a court's docket. Safranek, Do Class Action Plaintiffs Lose Their Constitutional Rights? (1996), 1996 Wis.L.Rev. 263, 267. In this vein, this Court notes that the class-action mechanism is primarily grounded on the premise that a judgment should have a binding effect on absent class members. *King,* 790 F.2d at 528; Kahan and Silberman, The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison (1998), 73 N.Y.U. L. Rev. 1193, 1202. The certification of a class-action lawsuit, the entry of a judgment and the subsequent enforcement of the full faith and credit doctrine, significantly promote effective time-management and the efficient conclusion to what would otherwise amount to

overwhelming litigation. See *King*, 790 F.2d at 528. To allow substantive collateral attacks would be counter-intuitive to this procedural relief that a class-action suit is intended to afford our judicial system nationwide.

B. Preservation of Judicial Resources

Moreover, by engaging in a substantive collateral review, this Court would squander Ohio's financial resources in its attempt to essentially "re-create the wheel." Such needless depletion of the Ohio judiciary's financial resources is a reality this Court should not encourage. If a forum court has established and applied procedural safeguards to protect absent class members, it is surely a waste of valuable financial resources to reexamine the finite points of law which are properly left for consideration on a direct appeal.

C. State Sovereignty

Competing with these two notions of judicial economy is the scholarly concern for a non-forum state's sovereignty and its right to determine which orders will be enforced within its borders. In the end, this Court rejects such a notion. The deference and esteem due to a particular state's autonomy cuts both ways. In the American system of justice, "states are independent sovereigns whose judgments and policy choices are generally entitled to respect." Murphy, 47 U.Kan. L. Rev. at 490. A *de novo* review of proceedings when the forum court carefully considered all relevant factors seems unnecessarily offensive to that court and usurpative of the appellate function. *Id.* at 489. The key to the philosophy and spirit of the class-action mechanism is the amount of discretion and control granted to a trial court over the

maintenance, management and effect of the class-action. Note, Collateral Attack on the Binding Effect of Class Action Judgments (1974), 87 Harv.L.Rev. 589, 602. "Errors are subject to correction, on a limited basis, by a higher court." Murphy, 47 U.Kan. L. Rev. at 489. As such, Ohio courts must embrace the considerable role of the certifying court and the significance of judicial economy in modern jurisprudence. Any other result would trespass against the principles at the very core of the full faith and credit doctrine and demean the values girding the class-action mechanism.

2. Application

Turning to the matter at bar, this Court concludes that the Ohio class members' due process right to collateral review is properly limited to the determination of (1) whether safeguards to guarantee sufficient notice and adequate representation were in place during the prior litigation, and (2) whether such safeguards were applied. Because the answers to both queries return in the affirmative, this Court holds that the Ohio class was afforded due process in the *Schwab* action.

A. Notice

As noted previously, the Ohio class has challenged the sufficiency of notice in the *Schwab* action. The Illinois' class-action statute provides circuit courts broad discretion to order whatever type of notice "it deems necessary to protect the interests of the class and the parties." Section 2-803 of the Illinois Code of Civil Procedure. In tackling this issue, the Circuit Court dedicated almost one-third of its final journal entry to the resolution of the *Schwab* class' objections

regarding notice. It discussed the relevant case law and then addressed each type of notice given. In the end, the Circuit Court found that the means of notice "were reasonably certain to inform those affected" and that they "satisfied the requirements of due process." This Court believes that the Circuit Court's findings demonstrate both the presence and application of procedural safeguards. Therefore, in light of modern constitutional requirements, the Ohio class' argument on notice must fail.

B. Adequate Representation

As for the Ohio class' attack upon the adequacy of representation, it appears that it, too, is without merit. First, the Ohio class has argued that AOL deliberately pressured the national class and its counsel into a position from which they did and could not adequately represent the interests of all AOL subscribers nationwide. However, its argument is based on the ill-fated premise that the *Schwab* class did not secure the best practicable notice.[7] Second, the Ohio class has asserted that counsel for the *Schwab* class agreed to a "cheap" settlement. Mere disagreement with the terms of a settlement cannot provide grounds for a collateral attack. If such an

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[7] As previously held, the Ohio class' challenge of the adequacy of notice in the *Schwab* matter, under modern constitutional requirements, must fail. This Court would also note that as stated in the Common Pleas order and as counsel conceded during oral arguments before this Court, counsel for the Ohio class attended the fairness hearing in the *Schwab* matter, yet failed to raise the objections they attempt to raise now. As such, collateral attack is precluded. See *Wyatt v. Wyatt* (1992), 65 Ohio St. 3d 268, 270.

argument was upheld, absent class members could always mount a collateral attack against the fairness of a settlement under the guise of challenging the adequacy of representation. In any event, this Court is charged only with the duty of determining whether procedures to protect the due process rights of the absent class members, namely the Ohio class, were established by Illinois law and applied by the Circuit Court.

Under Illinois law, before a circuit court is permitted to certify a class-action, it must find:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

Carrao v. Health Care Service Corp. (1983), 118 Ill. App. 3d 417, 426, 454 N.E.2d 781, 789, citing Section 2-801 of the Illinois Code of Civil Procedure. Each of these determinations is one of fact, and under Illinois law, subject to a review of an abuse of discretion. *Id.* ("The scope of our review is limited to an assessment of the trial court's exercise of discretion and

does not extend to an independent, *de novo*, evaluation of the facts alleged to justify litigation of the case as a class action."), citing *McCabe v. Burgess* (1979), 75 Ill.2d 457, 464-465, 389 N.E.2d 565, 568, certiorari denied 444 U.S. 916.[8] A review of the record indicates that the Circuit Court did in fact reference and consider the factors necessary to certify a class action. By construing both its January 30, 1997 order and its February 19, 1998 together, it is evident that the Circuit Court certified the *Schwab* class pursuant to Section 2-801 of the Illinois Code of Civil Procedure *et seq.* Therefore, no further inquiry by this Court is required. See *Epstein,* 179 F.3d at 648.

3. Summary

The United States Supreme Court once stated, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly ensures the

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[8] Again, this Court notes that it would be inconceivable to expand our review of another jurisdiction's determination beyond that which it would be subject to on direct appeal. To allow any further inquiry would allow a plaintiff class a second bite at the proverbial apple.

Moreover, assuming *arguendo* that this Court did enjoy the authority to engage in more than a facial, procedural review of the proceedings in *Schwab*, it appears that the Ohio class has failed to carry its burden regarding adequate representation. It has advanced nothing more than mere conjecture for the proposition that counsel for the *Schwab* class were pressured into settlement. Such empty assertions would not be enough to mount a successful constitutional challenge in any event.

protection of the interests of absent parties who are to be bound by it." *Hansberry v. Lee* (1940), 311 U.S. 32, 42, 85 L. Ed. 22, 27. Court proceedings need not provide more than the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for full faith and credit. *Kremer,* 456 U.S. at 481, 72 L. Ed.2d at 280. The Circuit Court in the *Schwab* action has meticulously addressed each requisite of due process as stated in *Shutts*. It expressly held that the means of notice were sufficient, afforded class members two opportunities to opt-out, conducted a fairness hearing in which objections to the settlement were presented, and expressly considered Illinois law regarding adequate representation in its certification of the class. Accordingly, after reviewing the record, this Court is satisfied that due process was afforded in the *Schwab* proceedings. In the interests of judicial economy, the spirit of the class-action mechanism and intent of the full faith and credit doctrine, any further inquiry shall be reserved for the Illinois judicial system and the United States Supreme Court. The trial court's entry of summary judgment in favor of AOL was proper, and the Ohio class' second assignment of error is overruled.

This Court does not reach the Ohio class' first assignment of error. Pursuant to App.R.12(A)(1)(c), this Court declines to address its merits.

III.

In sum, the ruling in *Schwab* shall be afforded full faith and credit in Ohio courts. As a result, the Ohio class' second assignment of error is overruled, and its first

assignment of error is rendered moot. The judgment of the Common Pleas Court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellants.

Exceptions.

/s/_____
BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS

BAIRD, P.J.
DISSENTS DISSENT

Though admittedly risking a depletion of Ohio's resources, it seems to me that the notice procedures approved in *Schwab* are not consistent with any real due process analysis.

This is not to say that there might be some compelling reason why individual, written notice could not have been supplied to each AOL subscriber, much in the same way as his monthly bill for the service is presented. Likewise, there may well be some justification for on-line notification. There is no such justification in this case, however, for the fact that such notification was not captioned so as to draw the attention of AOL subscribers in particular. Not only was personal notice not required, there was not even any requirement that the notice icon be titled in such a way as to draw the attention of subscribers. It is hard to imagine any notice being any less likely to draw the attention of a subscriber and give notice there to than was the procedure followed in this case.

The difference between an on-line notice captioned "Attention AOL Subscribers" and one captioned "AOL RESOLVES class action suit. Learn the details" is the difference between a serious attempt to notify a group of people and one that is ludicrously short of that standard. As such, I respectfully dissent.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIVISION

[Filed February 19, 1998]

No. 96 CH 13732

Steven F. Schwab, individually, and on behalf of all other persons similarly situated,	)
v.	)
America Online, Incorporated, a Delaware Corporation.	)

Judge Stephen A. Schiller

OPINION AND ORDER

The court conducted a fairness hearing regarding the proposed settlement of this class action litigation. The court, having considered the briefs submitted in support of the proposed settlement, the submissions of those objecting to the proposed, and the arguments of counsel, now renders its decision.

I. FACTS

America Online (AOL) sells online services, which allow a personal computer user to gain access to AOL's online network, including access to the Internet. An AOL subscriber connects to the AOL network via personal computer, a residential telephone line, and a modem or other device which dials AOL's telephone access number and establishes a link between the personal computer and the larger network. Prior to December 1996, AOL billed subscribers for its services on a metered basis, e.g. $9.95 per month for up to 5 hours of access and $2.95 for each additional hour. As of December 1996, AOL changed its pricing plan to a flat fee of $19.95 per month for unlimited access to AOL's online service. At the same time, AOL began offering discounts for subscribers who paid in advance for one or two years of service under the flat fee price plan at a cost of $17.95 per month for one year or $14.95 per month for two years of service. The new pricing system not only motivated many of the existing subscribers to convert to the flat fee plan, but also attracted new subscribers.

The plaintiff asserts that AOL promoted the flat fee pricing plan without having adequate system capacity to support it. The plaintiff further contends that in advertising its new price plan, AOL represented that subscribers would have unlimited access to its online service. AOL concedes that it experienced an "unprecedented and sudden surge in demand" after it initiated the flat fee plan. However, AOL asserts that it informed all subscribers that its services would be provided "on an as is, as available basis without warranties of any kind." Further, AOL relates that prior to implementing the flat fee plan, it sent letters to all of its

subscribers warning them of an expected surge in usage and temporary "traffic congestion" during peak hours. In addition, after implementing the plan, AOL sent a online message to all of its subscribers informing them of expected delays in logging-on due to the new pricing system.

The flat fee plan encouraged existing subscribers to stay connected to the network for longer periods of time and attracted many new subscribers. Thus, the demand for connection to the service greatly increased, resulting in difficulty accessing the service. Many subscribers experienced busy signals when attempting to connect to he service. The log-on delays affected subscribers of the flat fee plan as well as those who remained on a metered fee plan.

The log-on delays led to the filing of this class action litigation, in which the plaintiff has alleged a breach of contract claim and violations of the Illinois Consumer Fraud and Deceptive Business Practice Act, 815 ILCS 505/1 et seq. (ICFA). This court granted the plaintiff's motion for class certification, pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-801 et seq., thereby certifying a class defined as:

> "All AOL subscribers throughout the United States who were subscribers to AOL on December 1, 1996 or who became subscribers on said date or thereafter."

The parties have reached a proposed settlement which treats the claims of the various class members as follows:

(1) For the months of December 1996 and January 1997, the proposed settlement agreement incorporates by reference the Assurance of Voluntary Compliance (AVC) which was executed between AOL and 45 State Attorneys General. The parties assert that one of the alternatives of relief, one free month of service, was added to the terms of the AVC as a result of the demands of class counsel herein. The AVC provides for the following relief related to the billing periods beginning in December 1996 and/or January 1997: either a refund or credit as calculated below or an automatic credit equal to the one month membership fee without regard to the member's actual use of the service. This settlement extended the time in which to file a claim from June 1997 under the AVC to December 1, 1997. If the subscriber chooses a refund or credit, the following calculations are to be used:

(i) for a member of the $19.95 unlimited access plan, or the prepaid term accounts, the credit or refund shall be in the amount of: (a) the full monthly fee for each billing period in which the member used the service for less than two hours; (b) fifty percent of the monthly fee for each billing period in which the member used the service for two or more hours, but less than eight; and (c) twenty-five percent of the monthly fee for each billing period in which the member used the service for eight or more hours, but less than fifteen.

(ii) for a member under the $9.95 metered plan, the credit or refund shall be in the

amount of: (a) the monthly fee for each billing period in which the member used the system for less than one hour; and (b) fifty percent of the monthly fee for each billing period in which the member used the service for one hour or more, but less than three.

(iii) for a member under the $4.95 metered access plan, the credit or refund shall be in the amount of: (a) the monthly fee for each billing period in which the member used the system for less than one hour; and (b) fifty percent of the monthly fee for each billing period in which the member used the service for one hour or more, but less than two.

(2) For the months of February 1997 or March 1997, class members under the flat fee plan or prepaid plans, who used the service between two and fifteen hours, are entitled to an additional refund or credit, calculated as follows:

(i) fifty percent of the monthly fee for a member who used the service for two hours or more, but less than eight hours, during the month for which the refund is sought.

(ii) twenty five percent of the monthly fee for a member who used the service eight to fifteen hours during the month for which the refund is sought.

(3) Class members, who used the service for more than fifteen hours in the months of February 1997 and March 1997, are entitled to a full month credit for one, but not both, of those months, if they experienced difficulty gaining access to AOL's service and was a subscriber throughout the period of February 4, 1997 to June 1, 1997.

II. STANDARD OF EVALUATION

In evaluating a class action settlement, the court must determine whether the proposal is fair, reasonable, and in the best interest of all those who will be affected by it. GMAC Mortgage Corporation of Pennsylvania v. Stapleton (1992), 236 Ill. App. 3d 486, 493 (citations omitted). The court must consider the following set of factor sin determining whether a settlement is fair:

> "(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in the settlement;
> (2) the defendant's ability to pay;
> (3) the complexity, length and expense of further litigation;
> (4) the amount of opposition to the settlement;
> (5) the presence of collusion in reaching a settlement;
> (6) the reaction of members of the class to the settlement;
> (7) the opinion of competent counsel; and
> (8) the stage of proceedings and the amount of discovery completed." The City of Chicago v. Korshak (1990), 206 Ill. App.3d 968, 972.

The court is limited as to what course of action it may take with respect to proposed settlements. It may only approve or disapprove of the entire agreement, as opposed to excising unfair portions from it. Waters v. City of Chicago (1981), 95 Ill. App.3d 191, 924.

Each of the Korshak factors will be addressed below. In assessing the fairness of a settlement, the court must view the settlement as a whole, considering all of those factors. Langendorf v. Irving Trust Company (1992), 244 Ill. App.3d 70, 78. However, the principle factor consists of "a balancing or comparison of the terms of the compromise with the likely rewards of litigation, as well as a determination of whether the settlement is in the best interest of all those who will be affected by it." Korshak, 206 Ill. App.3d at 972 (citing People ex rel. Wilcox v. Equity Funding Life Insurance Co. (1975), 61 Ill.2d 303, 316).

III. FINDINGS:

A. Balancing the Strength of the Case v. the Relief Offered in the Settlement:

The plaintiff concedes that AOL's liability is not a "foregone conclusion," even though he believes that the claims are strong. AOL affirmatively states that it would prevail if the merits of the case were tried. In support of its contention, AOL advances numerous defenses to the claims made in this litigation. For example, AOL contends that the plaintiff cannot prove a deceptive act under any state's consumer fraud law for two reasons. First, AOL asserts that its advertisements of its flat fee pricing plan cannot be construed as promising immediate or uninterrupted services.

Second, AOL notified its members of the possible "traffic congestion" in accessing the system prior to implementing the new price plan. In addition, the Terms of Service (TOS) specifically provides that use of the AOL system is on an "as is" "as available" basis without any express or implied warranties. AOL's position arguably has merit.

Under the ICFA, a plaintiff must allege and prove: "(1) a deceptive act or practice, (2) intent on the defendant's part that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce." Martin v. Heinold Commodities Inc. (1994), 163 Ill.2d 33, 75 (citation omitted). Similarly, under Virginia law, fraud must be pleaded with specifically regarding the following: "(1) the intentional misrepresentation of a pre-existing material fact by the defendant or the concealment of a material fact it there is a duty to disclose, (2) reliance on the misrepresentation or concealment which induces the plaintiff to act, and (3) injury to the plaintiff resulting from the misrepresentation or concealment." Winfrey v. Bell (1992), 28 Va. Cir. 55, 1992 Va. Cir. LEXIS 241 *1, *3.

The difference between the laws of both states involve intent and reliance. With respect to the ICFA, the Illinois supreme court noted that the Act did not require actual reliance. Siegel v. Levy Org. Development Co. (1992), 153 Ill.2d 534, 542. Subsequently, the appellate court explained that in cases where public officials file suit, they do not need to establish that they relied on the alleged deceptive acts in order to plead a sufficient cause of action under the ICFA. Elipas Enterprises, Inc. v. Silverstein (1993), 243 Ill. App.3d 230, 235. However, an individual plaintiff seeking money damages pursuant to the ICFA must establish reasonable or

justifiable reliance. Elipas Enterprises, 243 Ill. App.3d at 235. However, Virginia law requires an intent to misrepresent and actual reliance on the misrepresentation. Winfrey, 1992 Va. Cir. LEXIS at *3.

Given that AOL was forthright about the expected "traffic congestion," informing its members of the expected surge in demand for access to the service, the plaintiff would have a difficult time proving that AOL engaged in a deceptive act. Assuming arguendo that the court would apply Virginia law to the facts of this case, the plaintiff would also have a difficult time proving that AOL intended to deceive its customers or that the class members relied on the alleged misrepresentations.

In addition, the ICFA provides for a private cause of action where the "plaintiff can show that he suffered damage as a result of unlawful conduct proscribed by the statute." Tarrin v. Pellonari (1993), 253 Ill. App.3d 542, 554. A plaintiff may only recover damages under the ICFA when the injury is the direct and proximate result of the alleged violation of the act. Martin, 163 Ill.2d at 68-69 (citations omitted). The fact that the average AOL member increased his or her usage from 7 hours per month to 14 hours per month after the price plan took effect, and eventually topping off at 17 hours per month under the new plan, further supports AOL's position that the plaintiff would have difficulty proving damages.

The inability to prove damages is also fatal to the plaintiff's breach of contract claim. In order to succeed in an action for breach of contract, the plaintiff must allege and prove "evidence of a contract, plaintiff's performance of all

required conditions, facts indicating the defendant's breach, and the existence of damages as a consequence thereof." Sutherland v. Illinois Bell (1993), 254 Ill. App.3d 983, 993. Not only is the fact that the average members increase in hours logged on to the service damaging to the plaintiff's case, but also the fact that the class members continue to pay their bills and maintain their membership with AOL. Relevant to the latter factors are the voluntary payment doctrine and the principle of ratification.

The voluntary payment doctrine, which is applicable to the breach of contract claim and the ICFA claim, provides that "money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal." Smith v. Prime Cable (1996), 276 Ill. App.3d 843, 847-48. As a general rule, monies paid under a claim of right to payment, but under a mistake of law are not recoverable, unless fraud, coercion or mistake of fact is present. As stated above, the plaintiff arguably would have difficulty proving fraud in this case. Thus, it is possible that the voluntary payment doctrine would bar the plaintiff's claims. Further, the plaintiff has not alleged and arguably cannot allege a necessity amounting to compulsion in order to avoid application of the doctrine. See Smith, 276 Ill. App.3d at 848. In sum, online services are similar to cable services in that neither are a necessity.

With respect to ratification, the facts of this case are similar to those of Bass v. Prime Cable of Chicago, Inc. (1996), 284 Ill. App.3d 116. In Bass, Prime decided to add certain fees for its cable services. Before it implemented its decision, Prime notified its customers of the billing changes.

In ruling on motions for summary judgment in the class action which followed, the trial court found that the defendant's actions constituted a modification of a terminable at will contract which the plaintiff ratified by continuing to receive and pay for cable services. Bass, 284 Ill. App.3d at 125. The appellate court affirmed the trial court's decision. Similarly, in the case at bar, by continuing to use and pay for AOL's online service, the class members arguably ratified the conditions of those services as stated in the TOS.

From the foregoing, it is clear that the plaintiffs would have a difficult time establishing AOL's liability and damages arising therefrom. Thus, the balancing of the strength of the case against the relief sought weighs in favor of approval of the settlement.

B. Defendant's Ability to Pay:

This factor will not be addressed in this opinion, since AOL is a large, publicly held corporation which has already paid millions of dollars in claims under the AVC and also continues as an on-going business.

C. Complexity, Length and Expense of Further Litigation:

Both parties agree that this litigation could take years to resolve itself, in that the plaintiffs believe that their claims are valid and AOL continues to deny liability. Further, AOL has shown that is has meritorious defenses. It is also quite possible that either side would appeal the decision rendered in this case.

D. Amount of Opposition:

The members of the class have responded to the notice of the proposed settlement which demonstrates support on the part of the class members. In an affidavit, Noel Pitts, an AOL employee, testified that as of November 1997, AOL has received 128,479 claims pursuant to proposed settlement. In contrast, approximately 250 objections and approximately 740 exclusions have been received. Those in opposition of the settlement stress that about 77,000 of the nearly 129,000 claims received were filed pursuant to the AVC. However, it should be noted that this settlement extended the time in which claims under the AVC could be filed. Thus, this settlement may claim credit for a portion of the 77,000 AVC claims.

Several attorneys representing members of the class in litigation against AOL before other courts raised objections, including objections to this court's jurisdiction, the amount of attorney's fees stated in the settlement, the sufficiency of the notices issued, and the treatment of a portion of the class. This opinion will not address the objection regarding jurisdiction, given the fact that the court previously conducted a two day hearing on this issue and rendered a decision.

As for the objection to the amount of attorney's fees, counsel argued that there was no way to determine whether the fee is appropriate without actual time records being filed. However counsel misconstrues the attorney fee provision included in the proposed settlement. Class counsel agreed to limit its application for attorney's fees to $3,000,000. If the court were to approve the proposed settlement, the court would not be awarding class counsel $3,000,000 in fees.

Rather, class counsel would be required to file a petition for fees. Under Illinois law, the court has the discretion to determine whether to award fees based on a percentage of the common fund or based on the application of the lodestar method. See Brundidge v. Glendale Federal Bank (1995), 168 Ill.2d 235. The lodestar method takes into consideration the reasonable number of hours devoted to the case and the reasonable value of those services increased by a multiplier representing other considerations, such as the complexity of the litigation. Brundidge, 168 Ill.2d at 239-40. The court thus rejects counsel's objection.

Several objections were made with respect to the sufficiency of the notice. Objectors argued that other forms of notice would have been the best practicable notice under the circumstances of this case. For example, objectors argued that the following forms of notice of the proposed settlement should have been utilized: (1) a "pop-up" notice on AOL's welcome screen; (2) direct mail to AOL members; or (3) e-mail. Second, objectors argued that the post-card notice following the modification of the Memorandum of Understanding between the parties to narrow the form of the release, did not include sufficient information. Lastly, objectors argued that the cumbersome process of actually following the prompt to reach the notice of settlement in conjunction with the process for filing claims pursuant to the notice, serves to dissuade class members from acting on the settlement.

As a general rule, "[p]roper notice to class members is essential to their right to due process." Waters v. The City of Chicago (1982), 111 Ill. App.3d 51, 57. The Illinois Code of Civil Procedure, 735 ILCS 5/2-803, grants the court the

discretion to order "such notice that it deems necessary to protect the interest of the class and the parties." Thus, whether notice is required and what type of notice are matters for the court's discretion, which is limited only by the dictates of due process. Carrao v. Health Care Services Corp. (1983), 118 Ill. App.3d 417, 429. Due process of law requires the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, 314 (quoting Grannis v. Ordean (1914), 234 U.S. 385, 394). The right to be heard is worthless unless one is informed of the pending matter and can choose what, if any, action to take. Mullane, 339 U.S. at 314.

The Supreme Court reiterated the requirements of Rule 23(c)(2) that parties to class action proceedings must provide the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. Rule 23(c)(2); Eisen v. Carlisle & Jacquelin (1974), 417 U.S. 156, 174. An earlier Supreme Court decision defined the fundamental requirement of due process as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314 (citations omitted). In addition, the notice must reasonably convey the required information and afford a reasonable time for those interested to appear. Mullane, 339 U.S. at 314 (citations omitted). The Supreme Court stated the following guideline for determining the adequacy of notice:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as

> one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Mullane, 339 U.S. at 315 (citations omitted).

Using this standard, the court will assess the sufficiency of the notice provisions in this case.

The parties employed several forms of notice in the case at bar. This court approved the notice of pendency of the class action which was published in The Wall Street Journal, The New York Times, the Chicago Tribune, the Los Angeles Times and USA Today. The notice informed the potential class of the nature of the action and informed them that they could be included in the class or opt-out and what to do in either situation. The parties also published in the same newspapers, a settlement notice which included the terms of the agreement and the procedures for making a claim, objecting to the settlement, or opting-out of the settlement. Subsequently, the parties published an updated notice regarding the extension of time in which to file claims. This notice referred the reader to the full terms of the prior settlement notice, listing several ways to retrieve a copy of the prior notice.

In addition to publishing the notices in papers, the parties issued a "Welcome Screen" notice on the AOL network. Every time AOL members log on to the network, they are greeted with the Welcome Screen. AOL posted a message on this screen, informing members of the pending class action and the settlement terms. AOL also added updated information, as required, to this screen. By clicking on this message, members were taken to a subsequent area where they could read, download, or bring the full text of the settlement notice. AOL reports that as of October 31, 1997, the Welcome Screen received 96,354,425 hits. The full text of the settlement was posted for nearly six months.

In addition to the Welcome Screen posting, AOL posted the settlement notice on its Member Services screen. All members are contractually obligated to check periodically the Member Services screen for updates regarding AOL services. AOL indicates that its Member Services screen received 51,938,560 hits from the end of May 1997 until November 1997. AOL also posted the settlement notice in a free area of AOL and on the Internet. In order to contact former members, the parties completed two separate mailings - by bulk mail and by first class mail. Thus, in addition to the Internet posing, former members were directly contacted by AOL. Lastly, AOL established a 1-800 claims number which provides a step-by-step guide for making claims under the terms of the settlement. Access to this assistance is available on a 24 hour basis.

The means of notice employed in this case were reasonably certain to inform those affected of the nature of the action, the terms of the settlement, and how to make a claim or objection, or altogether opt-out of the settlement. The

parties individually contacted former members by mail as required by due process. With respect to current members, the use of the online service itself in the form of the Welcome Screen, Member Service Screen, and the free area of AOL, is more effective than sending individual notices by mail. Instead of receiving one notice by mail, current members received multiple notices every time that they logged on to the service. The court rejects the assertion that a pop-up screen would have been more appropriate than the Welcome Screen in this instance. Instead, the court finds that either form of notice is reasonable or that both are equally the best practicable notice. Due process does not require that the class members be inundated with multiple forms of reasonable notice.

Lastly, AOL indicates that it does not have the capacity to send a mass e-mail to all members. There are other difficulties with respect to e-mail, including the fact that members may bar receiving e-mail from sources not on the member's e-mail list. Thus, there is no guarantee that all members would obtain the e-mail message, even if AOL had the capacity to send a member-wide e-mail.

Under such circumstances, this court finds that the means of the notices employed in this case satisfied the requirements of due process of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314 (citations omitted).

The last objection which will be addressed by this opinion is the concern that part of the class has been excluded

from any relief under the terms of the proposed settlement. If a settlement is unfair to a subclass or a fraction of the class, the court should not sustain it. Waters v. City of Chicago (1981), 95 Ill. App.3d 919, 924. However, in this case, all members of the class are afforded some benefit under the terms of the settlement, even if limited to particular months. Counsel's objection is predicted on the assumption that the terms of the AVC cannot be incorporated into the terms of the proposed settlement before this court.

Those who have not made a claim under the AVC may make a claim under this settlement by virtue of the fact that the AVC was incorporated by reference and also this settlement extended the time in which to submit a claim under those terms. Thus, while those who were able to access AOL for less than two hours in February and March 1997 are excluded from the proposed settlement, they do receive some benefit in that they may still make a claim under this settlement for the months of December and January. The same applies to those who subscribed under a metered access plan. Counsel also objected to the fact that no relief is provided for the period beyond March 1997. However, by that point in time, AOL had already undertaken to upgrade its system capacity.

E. Absence of Collusion:

The court takes note of the fact that the parties engaged in extensive negotiations regarding this settlement, often with the assistance of the court. There is no evidence in the record that the parties acted in collusion.

F. Reaction of Class Members:

As noted above, AOL has received 128,479 claims pursuant to the proposed settlement, whereas only approximately 250 objections and approximately 740 exclusions have been received.

G. Opinion of Competent Counsel:

The court takes note of the fact that class counsel as well as counsel for AOL are competent and that neither parties' counsel has objected to the proposed settlement.

H. Amount of Discovery:

The parties indicated that thousands of documents related to this litigation have exchanged hands and have been reviewed. In addition, class counsel has deposed four of AOL's key witnesses. Having completed this discovery and an assessment of the strength of the claims, both counsel agree to the proposed settlement. The court is satisfied that a sufficient amount of discovery has been conducted.

IV. Judgment:

Having considered the above factors and having weighed the benefits of the settlement against the remote chance of success on the merits of the case, as well as the cost and duration of litigation if a compromise is not reached, this court concludes that the proposed settlement is fair, reasonable, and in the best interest of all class members.

THEREFORE, IT IS HEREBY ORDERED:

That the court approves the proposed settlement of this class action litigation.

Date: _____

Enter: /s/ _____
Judge Stephen A. Schiller